U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17165355

Date: SEP. 22, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a manufacturer and installer of stone products, seeks to employ the Beneficiary as a stonemason. The company requests his classification under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner didn't establish the Beneficiary's possession of the minimum employment experience required for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the record doesn't demonstrate the Beneficiary's qualifying experience "in the job offered." We will therefore dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE REQUIRED EXPERIENCE

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is March 28, 2019, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. The Agency may neither ignore a certification term nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states that the offered position of stonemason requires neither education nor training. Rather, the position's only minimum requirement is two years of experience "in the job offered." The labor certification states that the Petitioner won't accept experience in an alternate occupation. On a labor certification, experience "in the job offered" means experience performing the job duties of the offered position listed on the certification. *Matter of Symbioun Techs, Inc.*, 2010-PER-01422, slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted).

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about 10 years of full-time, qualifying experience. He stated that a masonry firm has employed him in the United States as a stonemason since March 2009.

To support claimed qualifying experience, a petitioner must submit a letter from a beneficiary's employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the name, address, and title of the employer, and describe the beneficiary's experience. *Id.*

The Petitioner didn't submit a letter from the Beneficiary's employer listed on the labor certification. Rather, the Petitioner submitted letters from a vice president of two U.S. general contractors.[1] The letters state the Beneficiary's full-time work for the companies as a stonemason since March 2009 and describe his duties. The letters also state that the contractors paid the Beneficiary's salary "through his own company," the masonry firm listed as his employer on the labor certification.

Online, state records identify the Beneficiary as the sole, corporate officer of the masonry firm. *See* Office of the Ill. Sec'y of State, "Corporation/LLC Search/Certificate of Good Standing," https://apps.ilsos.gov/corporatellc/CorporateLlcController (last visited Sep. 13, 2021). The Petitioner also submitted copies of federal income tax returns of the firm, identifying the Beneficiary as its sole shareholder.

[1] The stationery of the first letter lists the name of only one general contractor. In response to the Director's notice of intent to deny the petition, however, the Petitioner submitted a second letter from the same signatory on stationery listing the name of an additional general contractor at the same address.

Beneficiaries may gain qualifying experience through self-employment or employment by companies that they own. But proof of such experience must include more than the beneficiaries' own representations. For example, to demonstrate a noncitizen's claimed experience as a self-employed roofing supervisor in labor certification proceedings, DOL required letters from his customers, invoices, and tax returns. *Matter of Whitfield Roofers*, 2004-INA-00013, slip op. at **2-3 (BALCA Mar. 3, 2005).[2]

The letters from the general contractors appear to constitute independent corroboration of the Beneficiary's claimed experience with his firm. As the Director noted, however, USCIS records identify the letters' signatory as the Beneficiary's brother, who is also the spouse of the Petitioner's sole shareholder.[3] Because the signatory appears to have an interest in the petition's approval based on his family ties to the Beneficiary and the Petitioner's sole shareholder, the letters alone constitute unreliable evidence of the Beneficiary's qualifying experience.

While a petitioner may submit a letter or affidavit that contains hearsay or biased information, such factors will affect the weight to be accorded the evidence in an administrative proceeding. *Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be required to resolve inconsistencies or discrepancies in the record. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. at 376.

The Director also found that documentation supporting the Beneficiary's application for adjustment of status undermines his firm's purported employment of him as a stonemason since March 2009. The Beneficiary's brother signed a July 2009 letter on the Petitioner's stationery stating that, at that time, he supervised the Beneficiary, a stone cutter employed full-time by the Petitioner.[4] Also, in September 2010, the Beneficiary's brother faxed a signed response to USCIS questions, indicating the Petitioner's full-time employment of the Beneficiary since December 2007. The documents' descriptions of the Beneficiary's employer and position in 2009 and 2010 differ from those listed on the labor certification and in the contractors' letters. The discrepancies cast doubt on the Beneficiary's claimed qualifying experience from 2009 to 2019. *See Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner and Beneficiary deny that evidence of his claimed experience conflicts. They state that, after March 2009 - when the Beneficiary's firm formed and began employing him as a stonemason - he simultaneously continued employment with the Petitioner for another two years as a

[2] Decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) don't bind USCIS. *See* 8 C.F.R. § 103.10(b) (requiring USCIS employees to follow precedent decisions of only the Board of Immigration Appeals (BIA) and Attorney General in proceedings involving the same issues). But USCIS may find BALCA decisions persuasive or defer to them. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (requiring an administrative agency to defer to the reasonable, regulatory interpretation of a sister agency charged with issuing and enforcing the rule).

[3] Copies of the Petitioner's federal income tax returns for 2018 and 2019 identify the Beneficiary's sister-in-law as the company's sole shareholder. On the labor certification application, the Petitioner disclosed the family relationship.

[4] Although uncited by the Director, the Beneficiary's adjustment application also included paystubs indicating the Petitioner's full-time employment of him from April 2009 to July 2009.

stone cutter "on an interim basis," including completing projects that he had previously started. But the Petitioner and Beneficiary state that, since 2011, his firm has exclusively employed him full-time as a stonemason. The Beneficiary and his brother state that the Beneficiary has sole responsibility for executing masonry projects, including reviewing designs, acquiring materials, installing stones, and making any necessary corrections. As proof, the Petitioner submits computer printouts of the general contractors' payments to the Beneficiary's firm from April 2009 to September 2020, and copies of tax and payroll records indicating his employment of him from 2011 through 2019.

The Petitioner's evidence largely supports the Beneficiary's claimed employment by his firm, at least from 2011 through 2019. The printouts, described by the contractors' accountant as accurate, indicate that, during that period, the contractors paid the Beneficiary's firm a total of $783,978. Over the same period, the federal income tax returns of the Beneficiary's firm reflect total revenues of $840,050. The $56,072 difference between the contractors' payments and the revenue of the Beneficiary's firm indicates the contractors' generation of nearly all the firm's work during that period. Additionally, copies of individual federal income tax returns and IRS Forms W-2, Wage and Tax Statements, of the Beneficiary over the same period indicate his receipt of his firm's profits and an annual salary. A preponderance of evidence therefore demonstrates that the Beneficiary's firm employed him full-time from 2011 through 2019.

The record, however, lacks sufficient, reliable evidence of the Beneficiary's required employment "in the job offered." Evidence of the Beneficiary's employment from 2011 to 2019 as a stonemason - as opposed to as a stone cutter, for example - consists of only statements from himself, the Petitioner, and his brother. The Petitioner's president and the Beneficiary's brother have family ties to the Beneficiary. Their statements therefore do not reliably demonstrate his performance of the job duties of the offered position of stonemason from 2001 through 2019. Also, the Beneficiary's statement is self-serving, requiring corroboration by independent, objective evidence, such as invoices and letters from customers, contractors, and coworkers other than his brother and the Petitioner.

The record doesn't establish the Beneficiary's possession of the required experience in the job offered. We will therefore affirm the petition's denial.

III. THE VALIDITY OF THE LABOR CERTIFICATION

Although unaddressed by the Director, the record also doesn't establish the validity of the accompanying labor certification.

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker must include a valid, individual labor certification from DOL. 8 C.F.R. § 204.5(l)(3)(i). A labor certification employer must have a valid federal employer identification number (FEIN). 20 C.F.R. § 656.3(1) (defining the term "employer"). This requirement combats fraud, as DOL verifies a FEIN to ensure that a labor certification employer is a "*bona fide* business entity." Final Rule for Permanent Labor Certification, 69 Fed. Reg. 77326, 77329 (Dec. 27, 2004).

The accompanying labor certification identifies the Petitioner as the Beneficiary's prospective employer not only by name and address, but also by FEIN. On appeal, the Petitioner states that it previously filed

a Form I-140 petition for the Beneficiary in 2006, offering him the position of stone cutter. *See* [redacted] The prior petition identifies the Petitioner by the same name and Illinois address as this one. But the 2006 petition lists a different FEIN [redacted] than stated on this petition and its accompanying labor certification [redacted].

Online, state records indicate the registration of two corporations in Illinois under the Petitioner's name and address. *See* Office of the Ill. Sec'y of State, *supra* (last visited Sep. 13, 2021). One company formed in January 2004 and dissolved in May 2008. *Id.* The other formed in November 2008 and remains an active corporation. *Id.* The Form I-140, accompanying labor certification, and copies of the Petitioner's federal income tax returns for 2018 and 2019 indicate the company's formation in January 2004. We note that a corporation that receives a new state charter requires a new FEIN. IRS, "Do You Need a New EIN?" https://www.irs.gov/businesses/small-businesses-self-employed/do-you-need-a-new-ein (last visited Sep. 9, 2021). Here, the Petitioner filed the 2006 petition for the Beneficiary using FEIN [redacted], and filed this petition using a new FEIN, [redacted]. However, the Beneficiary's prior petition contains copies of federal income tax returns from 2004 through 2006 in the Petitioner's name and address and listing FEIN [redacted]. The tax returns therefore indicate that the U.S. Internal Revenue Service (IRS) issued FEIN [redacted] before the Petitioner's apparent incorporation in November 2008. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591.

Also, the Beneficiary's prior petition contains a copy of a 2003 federal income tax return of a company with a slightly different name than the Petitioner's and a different Illinois address. Online state records identify the Beneficiary's brother as this corporation's registered agent and sole corporate officer and indicate its formation in January 2001 and its dissolution in June 2005. *See* Office of the Ill. Sec'y of State, *supra* (last visited Sep. 13, 2021). The 2003 tax return lists the company's FEIN as [redacted] the same one used on the prior petition for the Beneficiary. Thus, the record also doesn't establish the FEIN of his first petitioner.

In addition, USCIS records show other Forms I-140 filed by petitioners using the same name and address of the Petitioner on this petition but with different FEINs. Like the prior filing for the Beneficiary, one of the other petitions lists FEIN [redacted].[5] The remaining three petitions reflect a third FEIN, [redacted].[6]

Because USCIS records link the Petitioner's name and address to multiple FEINs, the record doesn't establish the validity of the FEIN listed on the labor certification accompanying this petition. Thus, contrary to 8 C.F.R. § 204.5(l)(3)(i), the Petitioner has not demonstrated the petition's inclusion of a valid, individual labor certification. To approve a petition, USCIS must determine that "the facts stated in the petition are true." Section 204(b) of the Act. A petition includes all its supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS can't approve this petition if the accompanying labor certification misrepresents the Petitioner's FEIN.

[5] USCIS records identify this petition by receipt number [redacted]

[6] USCIS records identify the remaining three petitions by the following receipt numbers: [redacted]; [redacted] and [redacted]

The Director didn't notify the Petitioner of this additional, potential ground of denial. Thus, in any future filings in this matter, the company must explain the multiple FEINs linked to its name and address and submit independent, objective evidence that its valid FEIN matches the one on the labor certification, such as a copy of the IRS letter the company received assigning its FEIN.

In the alternative, the Petitioner may demonstrate itself as a "successor-in-interest" of the employer listed on the labor certification. Under certain conditions, a successor of a labor certification employer may use the employer's certification for immigration purposes. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A successor must acquire the rights and obligations needed to operate the labor certification employer's business or a discrete part of it. A successor must also: 1) fully describe and document the transaction(s) by which it acquired all or a relevant part of the predecessor; 2) demonstrate that, except for the change in employer, the job opportunity remains the same as stated on the labor certification; and 3) prove eligibility for the benefit request in all respects, including the abilities of it and the predecessor to continuously pay the proffered wage of the offered position from the petition's priority date onward. *Id.* at 482-83.

IV. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner also hasn't demonstrated its ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a position's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date onward. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS examines whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[7]

The labor certification states the proffered wage of the offered position of stonemason as $75,005 a year. As previously indicated, the petition's priority date is March 28, 2019. At the time of the appeal's filing in November 2020, regulatory required evidence of the Petitioner's ability to pay in 2020 was not yet available. Thus, for purposes of this decision, we will consider the company's ability to pay only in 2019, the year of the petition's priority date.

The Petitioner doesn't claim to have employed the Beneficiary in 2019 and didn't submit any evidence of payments to him that year. Thus, based solely on wages paid, the Petitioner hasn't demonstrated its ability to pay the proffered wage.

[7] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Quality Truck & Trailer Repair, Inc. v. Johnson*, No. 13-cv-05527, 2014 WL 3906511, *3 (N.D. Ill. Aug. 11, 2014).

The Petitioner's federal income tax return for 2019 reflects net income of $422,242 and net current assets of $1,441,697. Both amounts exceed the annual proffered wage of $75,005. The record therefore appears to establish the Petitioner's ability to pay the proffered wage.

The Petitioner's tax return for 2019, however, bears FEIN [redacted] the same FEIN listed on the Form I-140 and accompanying labor certification. As previously discussed, the record doesn't establish FEIN [redacted] as the valid FEIN of the petitioning corporation. The Beneficiary's prior petition contains copies of tax returns indicating the FEIN's issuance before the Petitioner's apparent incorporation in November 2008. A petition must include evidence of the ability to pay of "the prospective United States employer." 8 C.F.R. § 204.5(g)(2). Because the 2019 tax return with FEIN [redacted] may not apply to the Petitioner, the return doesn't demonstrate the company's ability to pay the proffered wage. The record also doesn't demonstrate the Petitioner's submission of regulatory required evidence of its ability to pay in 2019 in the form of copies of an annual report, federal tax return, or audited financial statements. *Id.*

In addition, USCIS records indicate the Petitioner's filing of a Form I-140 petition for another beneficiary. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of its priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions).[8]

USCIS records show that the Petitioner's other Form I-140 petition was filed and approved after this petition's priority date of March 28, 2019, and that the other beneficiary hasn't obtained lawful permanent residence.[9] The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other petition. The record lacks the proffered wage and priority date of the other petition. USCIS therefore can't calculate the total proffered wages the Petitioner must demonstrate its ability to pay. For this additional reason, the Petitioner has not demonstrated its ability to pay the proffered wage.

In any future filings in this matter, the Petitioner must explain and document the applicability of the FEIN on the 2019 tax return to the petitioning corporation or submit other regulatory required evidence of the company's ability to pay the proffered wage that year. The Petitioner must also submit copies of an annual report, federal tax return, or audited financial statements for 2020. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay from a petition's priority date "and continuing until the beneficiary obtains lawful permanent residence"). Additionally, the Petitioner must provide the proffered wage and priority date of its other petition. The company may submit additional evidence of its ability to pay, including proof of any wages paid to beneficiaries in

[8] The Petitioner needn't demonstrate its ability to pay the proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before the corresponding petitions' priority dates or after the dates their corresponding beneficiaries obtained lawful permanent residence.

[9] USCIS records identify the other petition by receipt number [redacted].

relevant years and materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

V. CONCLUSION

The record on appeal doesn't establish the Beneficiary's qualifying experience in the job offered. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.